

MINUTES

MONTANA SENATE 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON PUBLIC HEALTH, WELFARE AND SAFETY

Call to Order: By **CHAIRMAN AL BISHOP**, on February 12, 2001 at 3:15 P.M., in Room 317-A Capitol.

ROLL CALL

Members Present:

Sen. Al Bishop, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Chris Christiaens (D)
Sen. Bob DePratu (R)
Sen. Eve Franklin (D)
Sen. Don Hargrove (R)
Sen. Dan Harrington (D)
Sen. Royal Johnson (R)
Sen. Jerry O'Neil (R)
Sen. Emily Stonington (D)

Members Excused: Sen. Fred Thomas (R)

Members Absent: None.

Staff Present: Jeanne Forrester, Committee Secretary
Susan Fox, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: SB 341, 2/1/2001; SB 361,
2/1/2001
Executive Action: SB 257; SB 288; SB178; SB 221

HEARING ON SB 341

Sponsor: SEN. DALE BERRY, SD 30, HAMILTON

Proponents: Jerri Domme, Montana Tobacco Use Prevention Program

Chris Tweeten, Attorney General's Office
Michael Huntley, Lewis and Clark City County Health
Department
Erin McGowan, American Cancer Society
Elizabeth Andrews, Helena

Opponents: Mark Staples, Montana Wholesale Distributors
Association
Joe Stevens, Montana Food Distributors Association
Chris Gallus, Montana Retail Association
Ronna Christman, Montana Petroleum Marketing
Jerome Anderson, R.J. Reynolds Tobacco Company

Opening Statement by Sponsor:

SEN. DALE BERRY, SD 30, HAMILTON introduced SB 341. This is a bill that would revise the sale of tobacco products by requiring tobacco products may be displayed for sale and sold only from behind a sales display that is staffed by the owner or salesperson.

Proponents' Testimony:

Jerri Domme, Montana Tobacco Use Prevention Program submitted testimony **EXHIBIT**(phs35a01) .

Chris Tweeten, Attorney General's Office, said he was here on behalf of Mike McGrath, who is in support of this bill.

Michael Huntley, Lewis & Clark City County Health Department, submitted a copy if his testimony **EXHIBIT**(phs35a02) .

Erin McGowan, American Cancer Society, asked the committee to support this bill.

Elizabeth Andrews presented a copy of her testimony **EXHIBIT**(phs35a03) .

She asked the committee to support this bill.

Opponents' Testimony:

Mark Staples, Montana Wholesale Distributors Association, said the wholesalers have been the people who fostered the "we card" program. He felt that program has been very effective. He asked the committee to reconsider this bill.

Joe Stevens, Montana Food Distributors Association, said his biggest problem with this bill is that those retailers at either end are affected far less than those in the middle. He said he felt this would really hurt retailers in smaller towns. He asked the committee to not to pass this bill.

Chris Gallus, Montana Retail Association, said this bill would require costly remodeling and construction projects. He urged the committee to oppose this measure.

Ronna Christman, Montana Petroleum Marketing, said she has a neutral position on this bill, because when she sent her members information about this bill, many of her members said they are already doing this. The one thing she is concerned about are the locked floor displays that are already in place. Would this bill require these displays to be behind the counter?

Jerome Anderson, R.J. Reynolds Tobacco Company, said he was here in support of the retailers that handle their product. He said they have actively supported programs to deter youth from using tobacco products. He urged the committee to oppose this bill.

Questions from Committee Members and Responses:

SEN. DUANE GRIMES asked if vending machines are currently limited to bar establishments or if they outlawed. **Mr. Staples** said they are not outlawed, they are limited to establishments that have alcohol licenses.

SEN. GRIMES said this bill would apply to every place, except the smoke shops that only sell tobacco products. **SEN. BERRY** said he believed the intent was in a smoke shop, people are coming in for tobacco products.

SEN. DAN HARRINGTON said would this apply to the locked cases that are not behind the counter. **SEN. BERRY** said he did not think it applied to them because there is no access to them. He then added the bill may have to be amended to make sure these locked cases not to be included in the bill.

Closing by Sponsor:

SEN. BERRY thanked the committee for a good hearing. He hoped this bill would keep some kids from smoking and he encouraged the committee to take a good look at this bill.

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EXECUTIVE ACTION ON SB 257

Motion/Vote: SEN. CHRISTIAENS moved that SB 256 BE AMENDED EXHIBIT (phs35a04) SB025701.asf. Motion carried 8-1 with Hargrove voting no.

Discussion:

SEN. DON HARGROVE said this amendment really takes things out of the judge's hands.

SEN. ROYAL JOHNSON asked if it is not already in the federal law that the judge has that discretion. Ms. Fox said what they learned with SB 116, is the department has the authority. If there is a dispute, then the courts have the authority.

Motion/Vote: SEN. CHRISTIAENS moved that SB257 DO PASS AS AMENDED. Motion carried 10-0.

HEARING ON SB 361

Sponsor: SEN. WALTER MCNUTT, SD 50, SIDNEY

Proponents: Bob Olsen, Montana Hospital Association
Jerry Loendorf, Montana Medical Association
Gloria Hermanson, Montana Ambulatory Surgery Centers
Gary Lucine, Montana Chapter of Physical Therapists
Amy Sullivan, Montana Occupational Therapy Association
Sami Butler, Montana Nurses Association

Opponents: Al Smith, Montana Trial Lawyers Association
Randy Bishop, Montana Trial Lawyers Association

Opening Statement by Sponsor:

SEN. WALTER MCNUTT, SD 50, SIDNEY introduced SB 361. He said it was requested by the Hospital Association. This bill is an act providing that a physician, nurse, physical therapist, occupational therapist, chiropractor, person practicing dentistry, hospital, psychologist, licensed social worker, or licensed professional counselor, claiming a lien for services or products provided to a person injured by another is not liable

for attorney fees and costs incurred in connection with obtaining payments or benefits subject to the lien.

Proponents' Testimony:

Bob Olsen, Montana Hospital Association, asked the committee to support SB 361. He said they are not asking the legislature to establish a change in regard to what is done. (When an injured person hires an attorney and tries to establish a settlement from an insurance company or some other party.) What they doing is asking the Legislature to establish in statute the common law that currently exists. He felt the legislature should make the rules, not the Montana Supreme Court. He passed out an example of the application of common fund doctrine **EXHIBIT (phs35a05)** .

Jerry Loendorf, Montana Medical Association said one of the key points is that the attorney's lien stays prior. The attorney is first in line to collect his money, second comes the hospital or other provider. Under the current law the hospitals can collect their full fee if there is money available. The remaining money then goes to the injured party. That is all there is to this bill, it simply codifies the common law and hopefully keeps it that way.

Gloria Hermanson, Montana Ambulatory Surgery Centers said they stand in support of the bill for all the reasons you have heard. She passed out an amendment **EXHIBIT (phs35a06)** SB036101.asf, this would include surgery centers in this act and in HB 309.

Gary Lucine, Montana Chapter of Physical Therapists, said they are in support of SB 316. This bill will help in assuring they would at least get their services paid for.

Amy Sullivan, Montana Occupational Therapy Association, said they are in support of this bill. She said this bill is fair and reasonable.

Sami Butler, Montana Nurses Association, said they are also in support of this bill.

Opponents' Testimony:

Al Smith, Montana Trial Lawyers Association, said they oppose this bill. However, they do agree this is really a matter of fairness. He said that looking at the example given by **Mr. Olsen EXHIBIT (5)**, shows if an attorney did not take the case, the

amount the hospital gets is nothing. It is only through the work of the attorney, the hospital bills get paid. The case before the Montana Supreme Court is only asking for equity and fairness.

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The attorney who takes on the case, should get paid for his work. What should be remembered is the health care institutions benefit from the services of an attorney, and without the help of an attorney no money is recovered.

Randy Bishop, Montana Trial Lawyers Association, said he is opposed to this bill, because it is unfair. He said his firm is involved in the handling of the case that is being heard before the Montana Supreme Court. He also said this committee is being asked to draft a law, based on this case, of which the circumstances are extremely rare. The case to which he is referring to is the Martin Killmer case. Through the efforts of the lawyers, a settlement was made available from the insurance company for Mr. Killmer, who is paralyzed from the neck down. Med Center One then stepped forward to be paid from the insurance company. There were serious questions about the cause of Mr. Killmer's injuries and the insurance company resisted paying the medical facility. Now the Montana Supreme Court is to determine who gets the money. Since the insurance company was not sure to whom they should pay the settlement.

Med Center One demanded they be paid in full from the fund that had been created by the efforts of Mr. Killmer's lawyers. They could have hired a lawyer to represent their interests, but they did not do that. They did not want to pay the money, they came in after the work had been done and wanted it for free (no overhead), and that is unfair. In addition, Med Center One said Mr. Killmer would qualify for Medicaid, and then they refused to submit their bills to Medicaid.

Mr. Bishop said all they are trying to ask, is when a person suffers an injury like Mr. Killmer's, shouldn't the hospital understand that and pick up a portion of Mr. Killmer's attorney fees. Fundamental fairness is involved and the law needs to be flexible enough to address the equities that are part of the unusual situations when they arise. The law should remain flexible enough so that everybody understands that fundamental fairness counts. This bill should not pass.

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL asked if someone gets hurt, don't they owe the hospital for the services they received. **Mr. Bishop** said they do

owe the hospital for services. That is an obligation for services rendered and that is a legal obligation.

SEN. O'NEIL asked if it was okay if the hospital had the patient sue the person who caused the accident and the hospital would agree to accept payment of a portion of the bill. **Mr. Bishop** said that is legal and it is an example of good old capitalism.

SEN. EMILY STONINGTON said she was trying to understand the example from Mr. Olsen **EXHIBIT(5)**. Under the current law it looked to her like the attorney does fine, and the hospital does fine but the claimant does not do so well. She asked if under current law is this negotiated? **Mr. Bishop** said in his office, they will ask the medical centers to make an accommodation in their bill.

SEN. STONINGTON asked if his office would also make an accommodation in their bill. **Mr. Bishop** said the fact of the matter is that depends on the circumstances. In his office, they do "pro bono" work, and they adjust fees downward never upward.

SEN. STONINGTON asked **Mr. Lucine** if he had received calls from attorneys to negotiate what he would be paid. **Mr. Lucine** said he frequently receives calls from attorneys. The call is usually about negotiating his fees and his first question to the attorney is, "Are you negotiating your fees?" He feels the attorney should also negotiate their fees and that is only a matter of fairness.

SEN. STONINGTON said it looks like this bill makes it so the hospital gets paid everything and the attorneys negotiate with the claimant for the rest. **Mr. Lucine** said as he reads the bill, the last sentence says the attorney has priority.

Mr. Bishop said he read the bill the same as **Mr. Lucine**. He said he is not worried about the attorney's fees, he is worried about what the client will receive. He said if this is passed the medical facilities are saying they want every dime.

SEN. STONINGTON said are you saying is the loser in this bill is the client. **Mr. Bishop** said that is exactly right.

Mr. Olsen said if you do not pass this bill, what happens tomorrow is the common law theory still exists. This is not just about this one case before the Montana Supreme Court, these cases are popping up all over the state.

SEN. STONINGTON wondered if this bill removes the ability to negotiate. She said it looks like the attorneys gets their fees, the hospital gets their fee and the loser is the client.

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Mr. Olsen said that is a good question. We need to look at what that person is suing for in the first place. If the person is suing to recover medical services, the medical facilities should be paid for these services.

Closing by Sponsor:

SEN. MCNUTT said he was surprised the trial lawyers are concerned. If you read the language in this bill, they get paid first. The last line says their lien takes priority. He thinks these cases are not rare circumstances. No one is asking the attorneys to fund part of this. What this bill is saying is when there is a settlement, the hospitals should not have to pay part of the attorneys fees. He asked for a do pass on the bill.

EXECUTIVE ACTION ON SB 288

Motion: **SEN. JOHNSON** moved that **SB 288 BE AMENDED**
EXHIBIT(phs35a07) SB028801.asf.

Discussion:

SEN. DEPRATU asked if this would include places like the Salvation Army. **Ms. Fox** said they could go to the Board of Pharmacy and seek approval.

SEN. STONINGTON asked if these amendments had to do with who owns the medications in regard to nursing homes and their patients.
Ms. Fox said it did not.

Vote: Motion **carried 9-0.**

Motion/Vote: **SEN. JOHNSON** moved that **SB 288 DO PASS AS AMENDED.**
Motion **carried 9-0.**

EXECUTIVE ACTION ON SB 178

Motion: **SEN. JOHNSON** moved that **SB 178 DO PASS.**

Discussion:

SEN. JOHNSON said he felt this bill needs to keep going, all it does is take out the certificate of need (CON) if there is no funding.

SEN. FRANKLIN said she was against this motion.

SEN. DEPRATU wondered if there would be any amendments to this bill. **SEN. BISHOP** said there are no amendments to this bill.

SEN. STONINGTON said she thought this bill should stay in the committee.

Substitute Motion/Vote: **SEN. STONINGTON** made a substitute motion that **SB 178 BE TABLED**. Substitute motion carried 7-2 with Johnson and O'Neil voting no.

EXECUTIVE ACTION ON SB 221

Motion: **SEN. JOHNSON** moved that **SB 221 BE AMENDED EXHIBIT** (phs35a08) SBO22105.asf.

Discussion:

SEN. ROYAL JOHNSON explained these amendments these take care of the facilities that provide intermediate developmental disability care.

Vote: Motion carried 6-3 with Christiaens, Stonington and Franklin voting no.

Motion: **SEN. JOHNSON** moved that **SB 221 BE AMENDED EXHIBIT** (phs35a09) SBO22104.asf.

Discussion:

SEN. ROYAL JOHNSON explained these amendments these take care of the facilities that provide intermediate or skilled nursing care.

SEN. STONINGTON said this is only a moratorium on brand new facilities. **SEN. JOHNSON** said that is correct.

SEN. FRANKLIN had a question regarding swing beds. **Mr. Dawson** said the CON would allow up to 5 swing beds. He said swing beds are beds in the hospital that can be used as nursing home beds.

SEN. FRANKLIN asked **Ms. Hughes** to respond to the swing bed issue. **Ms. Hughes** said the amendment for the moratorium would open up the swing bed issue. This would create big problems for the nursing facilities, because they could do unlimited swing beds. Currently, they can fill up five beds. She said this would almost be worse than the elimination of CON, because there would be a very unlevel playing field. **Mr. Olsen** said swing beds account for 1% of all the nursing home beds. He added Medicaid requires the patient be transferred out of a swing bed to a nursing home facility.

SEN. JOHNSON asked if there is someone on staff who does the nursing home CON. **Mr. Dawson** said the person who was on staff for this has left the department. They have someone on staff for an interim basis, until they find out the resolution of the CON.

Vote: Motion carried 5-4 with Christiaens, Franklin, Hargrove, and Stonington voting no.

Motion: **SEN. JOHNSON** moved that **SB 221 DO PASS AS AMENDED.**

Discussion:

SEN. JOHNSON said he hoped the committee would support this bill, with the amendments. He added that if you have ever tried to get someone into a nursing home in a larger city in this state, you will find you will have a very difficult time, because those nursing homes are full.

SEN. FRANKLIN said she was going to vote against this.

SEN. HARGROVE said his biggest concern is that he doesn't see a compelling need to remove the CON.

SEN. DEPRATU said Montana is a large rural state, and this bill does not solve the problem for everybody.

SEN. O'NEIL said if the CON is such a good thing, maybe we should require a CON for Kmart and Walmarts.

Vote: Motion was tied 4-4 with DePratu, Franklin, Hargrove, and Stonington voting no.

SEN. BISHOP said he was going to leave the vote open for 24 hours.

The final Vote: Motion failed 4-7 with Bishop, Harrington, Johnson, and O'Neil voting aye.

ADJOURNMENT

Adjournment: 5:10 P.M.

SEN. AL BISHOP, Chairman

JEANNE FORRESTER, Secretary

AB/JF

EXHIBIT (phs35aad)